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AUG 04 2015

DIV. OF OIL, GAS & MINING

July 30, 2015

Paul Baker, Environmental Manager
Minerals Regulatory Program
Utah Division of Oil, Gas and Mining
1594 West North Temple, Suite 1210
Salt Lake City, Utah 84114-5801

Re: US Magnesium Rowley NOI & Reclamation Plan, M/045/008.

Dear Paul:

As you know, US Magnesium has been cooperating with Division staff on a reorganization of the Notice of Intent ("NOI") and Reclamation Plan for our Rowley magnesium operation, with the goal of making the format of these documents consistent with the current reclamation regulations (UCA R647-4) and NOI forms. We are also working with the Division on updating the amount of the financial surety for reclamation of our mining operations, applying the Division's latest estimating methodology to the work and tasks identified in the approved Reclamation Plan.

In the context of these updating activities, Division staff has suggested that it may be appropriate to revise the scope of our Reclamation Plan to include the Rowley processing plant. After reviewing our files, consulting with counsel, and considering the regulatory history of our operation, we do not believe there is a regulatory basis for the suggested revision.

The Rowley facilities were built and put into operation in 1972, shortly before the Mined Land Reclamation Act ("MLRA" or "Act") was enacted in 1975. The MLRA is, of course, the law which governs the NOI, the Reclamation Plan, the financial surety, and the issue now raised by the Division regarding the regulatory status of the Rowley plant. For mining operations like Rowley, which predated the MLRA, the Act became fully applicable upon approval of a NOI, a Reclamation Plan, and financial surety.¹ In 1979, the NOI and Reclamation Plan for the Rowley operation were approved by the Division, and the financial surety was approved by the Board, at which time the MLRA became fully applicable to the operation.

¹ See 1975 Utah Laws 523 § 26(1) (requiring operations active on the effective date of the Act to prepare and submit an NOI before July 1, 1977 and to obtain approval within 36 months of NOI submission).

The MLRA's definition of "mining operations," which specifies which activities are covered by the Act and require reclamation, has remained essentially unchanged since 1975, as have the corresponding definitions in the regulations.² What's more, the plant itself was not included in the Reclamation Plan or financial surety at that time, reflecting a conclusion by the Division and the Board that the plant was not primary processing, and not a "mining operation" subject to the Act. This initial permitting decision is significant for at least two reasons.

First, it represents an essentially contemporaneous interpretation and application by the Division and the Board of the just-enacted MLRA and regulations to the Rowley operation, which gives the decision particular weight under well-established principles of administrative law.³

Second, the legislature took particular care in the MLRA to recognize and protect the reliance interests that are created for mine operators when a NOI and Reclamation Plan are approved, by providing that an approved NOI is valid for the life of the operation, and that once a Reclamation Plan is approved it is not subject to newly adopted regulations or reclamation obligations.⁴

Taken together, these two reasons argue strongly against the propriety (and legality) of a reinterpretation by the Division, almost 40 years after the NOI and Reclamation Plan for Rowley were approved, that would for the first time make the plant itself a "mining operation" subject to the MLRA. Such a reinterpretation would be the equivalent of retroactive application of a new reclamation regulation or obligation to an approved NOI and Reclamation Plan, which is clearly prohibited by the MLRA.

This conclusion is further supported by the fact that on at least two occasions since the NOI was originally approved, the Division has effectively confirmed that the plant was not subject to the MLRA. In 1991 the Division undertook a review of the financial surety for the Rowley facility, including whether the plant site itself should be included. This review was concluded in 1992, without the plant site being added. The Division again reviewed and adjusted the financial surety in 2002, and again concluded that the plant site was not within Division jurisdiction under the MLRA. This decision took the form of a letter, signed by the then Division director, stating that the adjusted financial surety was "consistent with the Division's longstanding interpretation

² Compare 1975 Utah Laws 510 § 4(6) with Utah Code § 40-8-4(14)(a)-(b) (2014), and Rule M-2(e) (1975) with Utah Admin. Code R647-1-106 (2015).

³ See, e.g., *State Bd. of Land Comm'rs v. Ririe*, 190 P. 59, 62 (Utah 1920) ("contemporaneous construction put upon a statute by the officers who have been called upon to carry it into effect, made the basis of their constant and uniform practice for a long period of time . . . is entitled to great respect; and if the statute is doubtful or ambiguous, such practical construction ought to be accepted as in accordance with the true meaning of the law . . .") (internal citation omitted).

⁴ See 1975 Utah Laws 520 §§ 19(1) & 8(2) and Utah Code §§ 40-8-16(1) & 40-8-7(2)(2014).

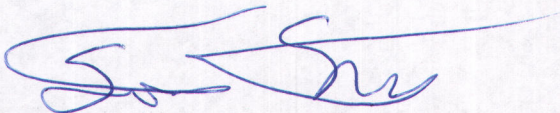
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that the plant area was not within Division jurisdiction,” and which included a map that clearly delineated the limit of Division jurisdiction, over the Rowley operation, ended at the west edge of the finished brine Holding Ponds [sometimes referred to as the star pond]. A copy of this letter, dated June 13, 2002, is available in the Division’s online files.

In sum, given the initial 1979 determination that the Rowley plant was not a “mining operation” covered by the MLRA; the repeated confirmation of that conclusion by the Division and Board over the ensuing decades, through both express action and acquiescence; and the MLRA’s clear prohibition against the expansion of reclamation obligations and Division jurisdiction once a Reclamation Plan has been approved, it is US Magnesium’s view that there is no basis for the Division to expand its jurisdiction and include the Rowley plant.

If you have any questions, feel free to give me a call.

Sincerely

A handwritten signature in blue ink, appearing to read 'Tom Tripp', with a long horizontal flourish extending to the right.

Tom Tripp
Technical Services Manager
US Magnesium LLC
801-433-4068
ttripp@usmagnesium.com

cc Michael Malmquist esq.